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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAMELA KRIEGER,

Defendant and Appellant.

A143896

(Alameda County
Super. Ct. No. C174370)

Pamela Krieger appeals from the denial of her petition for a certificate of rehabilitation. Her appeal is premised on her view that her statutory ineligibility for a certificate of rehabilitation, juxtaposed with the purported eligibility of a similarly situated class of sex offenders, violates the equal protection clause. We disagree for the reasons stated in *People v. Tirey* (2015) 242 Cal.App.4th 1255 (*Tirey II*), which is persuasive and dispositive.

BACKGROUND

In 1991 Krieger entered a guilty plea to one count of committing a lewd or lascivious act on a child under 14 years of age in violation of Penal Code section 288, subdivision (a).¹ On July 15, 2014 she filed a petition seeking a certificate of rehabilitation under Penal Code section 4852.01. Although her offense made her statutorily ineligible for such a certificate (§ 4852.01, subd.(d)), at that time *People v. Tirey* (2014) 225 Cal.App.4th 1150 (*Tirey I*) provided authority in support of the argument that her ineligibility violated constitutional equal protection guarantees because

¹ Further statutory references are to the Penal Code.

offenders convicted of sex acts with a child 10 years or younger were eligible for a certificate.

On August 20, 2014, while Krieger's petition was pending, the Supreme Court granted review of *Tirey I*. (See *Tirey II*, *supra*, 242 Cal.App.4th at p. 1258.) Five days later Assembly Bill 1438 was chaptered (2013-2014 Reg. Sess., effective Jan. 1, 2015), to clarify that offenders convicted under section 288.7 are ineligible for rehabilitation under section 4852.01. (*Tirey II* at p. 1259.) In May 2015 the Supreme Court remanded *Tirey I* to the court of appeal for reconsideration in light of *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, which rejected an equal protection challenge to disparate treatment of offenses for sex offender registration. (*People v. Tirey* (No. S219050, May 20, 2015).)

On November 5, 2014, the trial court in this case rejected Krieger's equal protection argument and found her statutorily ineligible for a certificate of rehabilitation. This timely appeal followed.

DISCUSSION

Krieger acknowledges she is statutorily ineligible for a certificate of rehabilitation due to her conviction under section 288, but she asserts the court erred when it rejected her equal protection challenge. She contends that the statutory scheme in effect at the time the court ruled on her petition violated equal protection principles because offenders convicted under section 288.7 (sex acts with a child 10 years or younger) were not similarly excluded from eligibility as those convicted under section 288. She also asserts the amendments effected by Assembly Bill 1438 were not yet in effect when the court denied her petition and are not retroactive. Accordingly, she maintains, they did not eliminate the legal basis for her equal protection challenge. We disagree with her crucial premise that A.B. 1438 would have retrospective effect if applied in this case.

The court in *Tirey II* addressed that precise question after the Supreme Court remanded *Tirey I* for reconsideration. (*Tirey II*, *supra*, 242 Cal.App.4th at p. 1259; *People v. Tirey*, S219050, May 20, 2015.) It relied on *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232 (*Western Security*). As explained there, the general rule that

statutes do not operate retroactively unless the Legislature plainly so intended is subject to the corollary “that a statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute’s true meaning. [Citations.] Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.” (*Id.* at p. 243.) One such circumstance, *Western Security* explains, is “when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: ‘ “An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.’ ” (*Ibid.*)

Tirey II reviewed the judicial harbingers and legislative history of Assembly Bill 1438 in light of this corollary. It reasoned: “Given this court’s call for legislative amendments in *Tirey I* . . . , the language of the statutory amendments enacted via Assembly Bill No. 1438, and the intent to clarify existing law as set forth in the legislative history, we must conclude Assembly Bill No. 1438 was explicitly intended to abrogate the holdings of *Tirey I* . . . , and to clarify the state of the law before our earlier decisions. To paraphrase the Supreme Court in *Western Security* [citation], the Legislature’s manifest intent was that Assembly Bill No. 1438 would apply to all persons, including persons convicted of violating section 288.7, convicted of forcible sex crimes committed against the most vulnerable members of our society. We therefore conclude Assembly Bill No. 1438 constituted a clarification of the state of the law before our decision[] in *Tirey I* Assembly Bill No. 1438 ‘has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.’ ” (*Tirey II, supra*, 242 Cal.App.4th at p. 1263, italics added.)

We agree with this analysis and likewise conclude Assembly Bill 1438 did not work a substantive change in the law. Rather, it was enacted in response to *Tirey I*'s "novel" statutory interpretation (*Tirey II, supra*, at p. 1261), to clarify existing law that offenders convicted under section 288.7 were, like those convicted under section 288, ineligible for certificates of rehabilitation. Accordingly, the trial court correctly rejected Krieger's equal protection claim and found her to be statutorily ineligible for a certificate of rehabilitation.

DISPOSITION

The order denying the petition for a certificate of rehabilitation is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.